

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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MAR 15 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 25 of the Cable Television)
Consumer Protection and Competition Act of 1992)
)
Direct Broadcast Satellite Public Service Obligations)

MM 93-25

To: The Secretary

**MOTION FOR EXTENSION OF TIME *NUNC PRO TUNC* WITHIN
WHICH TO FILE A PETITION FOR RECONSIDERATION OR
FOR ACCEPTANCE OF FILING MADE AFTER THE FILING DATE**

The Denver Area Educational Telecommunications Consortium, Inc. and other parties listed in the footnote below ("DAETC *et al.*" or "Petitioners")¹ respectfully submit this request that the Secretary exercise authority delegated to her under 47 CFR §0.231(i) to grant a 13-hour extension of the filing deadline for their timely-tendered but late-filed *Petition for Reconsideration* in the above-captioned matter, and accept the *Petition for Reconsideration, nunc pro tunc*, as timely-filed. See 47 CFR §1.46(b). In the alternative, and less preferably, Petitioners ask that their *Petition for Reconsideration* be accepted for filing after the filing date as if it had been timely tendered by the deadline for filing.²

¹Other parties to this request are A*DEC, American Psychological Association, Association of Independent Video and Filmmakers, the Benton Foundation, Center for Media Education, Peggy Charren, Community Technology Centers' Network, Consumer Federation of America, Media Access Project, Minority Media and Telecommunications Council, National Association of Elementary School Principals, National Association of School Psychologists, National Federation of Community Broadcasters, National Writers Union, Office of Communication, Inc. of the United Church of Christ, Public Access Corporation of the District of Columbia and Self Help for Hard of Hearing People.

²This petition is captioned as a motion for extension of time because the only authority specifically delegated to the Secretary under Section 0.231(i) is "to rule on requests for extension of time based on operational problems...." However, the text of Section 0.231(i) also contains a cross-reference to Section 1.46. Section 1.46(b), which governs rulemakings, states that motions for extension of time must be filed at least seven days before the filing deadline, but the last sentence of that rule provides that "[in emergency situations, the Commission will consider a late-filed motion for a brief

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The basis for this request is that operational problems associated with the Commission's electronic comment filing system ("ECFS") made it impossible to Petitioners to file their timely-tendered pleading by 11:59:59 PM, March 10, 1999, the deadline for electronic filing of *Petitions for Reconsideration* in this docket.³ The facts are as follows:

During the afternoon of March 10, 1999, the due date for the *Petition for Reconsideration*, Petitioners determined that they would prefer to file the reconsideration petition electronically. Because of past problems in electronic filing of pleadings within the jurisdiction of the International Bureau, co-counsel spoke to Rosalie Chiara of the International Bureau and, at her suggestion, to Sheryl A. Segal of the Office of Public Affairs, to confirm that electronic filing was possible in Docket 93-25. In addition to receiving this assurance, counsel also checked its connection with the Commission's ECFS system by logging on and successfully searching for previously filed documents in Docket 93-25.

Counsel is an experienced personal computer user familiar with the operation of Internet browser software and the process of uploading files. Counsel is familiar with the ECFS, and with

extension of time related to the duration of the emergency and will consider motions for acceptance of...filings made after the filing date." Thus, by virtue of the incorporation (by cross-reference) of Section 1.46(b) in the Section 0.231(i) delegation, it would appear that the Secretary also has the authority to resolve this matter by treating this motion as a "motion for acceptance... made after the filing date." It is essential, however, that such acceptance be deemed to be as if the pleading had been timely filed, *nunc pro tunc*. Failure to so provide would amount to effective denial of necessary relief requested here.

³Section 1.4(f) of the Commission's rules provide that electronically filed pleadings "must be received...before midnight." While the intent of this recently-modified regulation is quite clear, the language is susceptible to misconstruction, since the term "midnight" might be misunderstood. For example, one alternative construction might be that the language means that electronically filed pleadings must be filed 12:00 AM on the due date, *i.e.*, 24 hours earlier. Petitioners respectfully suggest that the Secretary resolve this minor ambiguity by explicitly ruling that Section 1.4(f) requires that electronic filings be made by 11:59:59 PM of the day on which the deadline falls.

the Commission's decision implementing electronic filing, *Electronic Filing of Documents in Rule-making Proceedings*, 13 FCCRcd 11322 (1998), as well as the Commission's ECFS users manual.

From approximately 10 PM until after midnight on March 10 and March 11, counsel made numerous unsuccessful attempts (perhaps as many as 20) to file the *Petition for Reconsideration* via ECFS. In none of these instances was it possible to make a successful submission of a cover sheet. This first step in the electronic filing process is a prerequisite for submitting a document; without receipt of a cover sheet, the ECFS will not accept or download a file. Counsel used two different personal computers connected to two different dial-up telephone lines. On each of the two computers, counsel attempted to file using both the latest version of the Netscape Communicator browser, version 4.50, and the latest version of the Opera Browser, version 3.51. (In general, counsel has found that the Opera software provides more reliable access to the ECFS than Netscape Communicator.) No "server error" messages were received.⁴

After spending much of the following morning engaged in fact finding, counsel successfully filed the *Petition for Reconsideration* electronically, following the very same procedures employed without success the previous evening. The filing was completed at or about 1:00 PM, March 11, 1999. A copy of the electronic receipt (number 1999311276742) is provided as Attachment A hereto.

Prior to attempting to file on March 11, counsel exchanged telephone messages with Sheryl A. Segal of the Office of Public Affairs, and then spoke to Patricia A. Rawlings of the Office of Public Affairs. Counsel also discussed the matter with Susan H. Steiman of the Office of General Counsel and William Caton of the Office of the Secretary. Ms. Rawlings confirmed that the

⁴According to Patricia A. Rawlings of the Office of Public Affairs, if an attempted access is unsuccessful because of operational difficulties caused by the filer's computer or Internet connection, an error message indicating "server error" is generated.

Commission's electronic logs show that Petitioners had made several attempts to access the ECFS system on the evening of March 10, 1999. She also determined that approximately 20 electronic filings were made on March 10, 1999, but that it appeared that none of these submissions was received after approximately 4:30 PM on that day.

Attorneys associated with the Institute for Public Representation, who serve as counsel to other parties in this proceeding, have advised Petitioners that they, too, were unsuccessful in filing electronically between 5:30 PM and midnight on March 10, 1999.⁵

Based on the foregoing, it is clear that Petitioners' inability to make an electronic filing after the Office of the Secretary closed at 5:30 PM on March 10, 1999 was attributable to operational problems associated with the Commission's ECFS. Petitioners exercised due diligence in preparing for electronic filing. They successfully used the same protocol to consummate a filing in the same docket the very next day. Another party experienced similar problems. Commission staff has confirmed that no other submissions were received in any docket during the time period in question.

Wherefore, Petitioners ask that the Secretary exercise her delegated authority to grant an extension of time *nunc pro tunc* through and including approximately 1 PM, March 11, 1999 within which to file *Petitions for Reconsideration* in Docket 93-25. In the alternative, Petitioners ask that the Secretary use her authority to accept the *Petition for Reconsideration* notwithstanding its submission after the filing deadline and deem that such acceptance be as if the pleading had been timely filed, *nunc pro tunc*. Petitioners also ask that the Secretary grant all such other relief as may be just

⁵Petitioners have confirmed that at least two *Petitions for Reconsideration* filed in Docket 93-25 were received by the Commission prior to the filing deadline. Those petitioners, the Association for Public Television Stations, *et al.*, and Time Warner Cable, made their submissions non-electronically. Thus, the Commission's November 25, 1999 *DBS Public Interest Order* in Docket 93-25 is non-final, and there is no need to consider whether it is necessary to reopen the docket to act upon this motion.

ATTACHMENT A

Federal Communications Commission

**The FCC Acknowledges Receipt of Comments From ...
DAETC ET AL
...and Thank You for Your Comments**

Case Confirmation Number is: '1999311276742' 1		
Date Received: Mar 13 1999		
Docket: 93-25		
Number of Files Transmitted: 1		
File Name	File Type	File Size (bytes)
PETITION FOR RECONSIDERATION	Adobe Acrobat PDF	216951

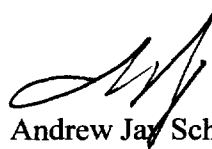
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updated 03/25/98

and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew Jay Schwartzman', with a stylized, cursive script.

Andrew Jay Schwartzman

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March 15, 1999